Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ARTHUR JOHNSON, individually and on behalf of all persons similarly situated,
Petitioner,

v.

AMERICAN AIRLINES, INC.,
Respondent.

Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Can airlines and passengers enter into enforceable ticket contracts, or is any effort to enforce such contracts preempted by the Airline Deregulation Act of 1978?

LIST OF PARTIES

This case was initiated as two class actions, which were consolidated on appeal. The petitioner in the first case is Arthur Johnson, and the respondent is American Airlines, Inc. The petitioners in the second case are Bernard Baskin and Marilyn Baskin, and the respondent is United Airlines, Inc.

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Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

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PETITION FOR WRIT OF CERTIORARI

Petitioners Arthur Johnson, Bernard Baskin and Marilyn Baskin respectfully pray that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First District, entered in this case on April 22, 1994.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, is reported at 261 Ill. App. 3d 622, 633 N.E.2d 978 (1st Dist. 1994), and is reproduced in the Appendix to this Petition (App.) at 1a. The order of the Supreme Court of Illinois denying discretionary review of

this case is reported at 157 Ill. 2d 503, —— N.E.2d —— (Ill. 1994), and is reproduced at App. 10a.

STATEMENT OF JURISDICTION

This petition has been filed within 90 days following the denial, on October 6, 1994, of discretionary review by the Supreme Court of Illinois (App. 10a). The opinion of the Appellate Court of Illinois, First District, was issued on April 22, 1994 (App. 1a). The petitioners' Petition for Rehearing in the Appellate Court was denied on May 26, 1994 (App. 7a). By order dated October 18, 1994 (App. 11a), the Illinois Supreme Court stayed the issuance of the mandate in this case, pending the filing of this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

Two provisions of the Federal Aviation Act of 1958 (the "Act") are relevant to this appeal: (1) section 1305(a)(1), which was added by the Airline Deregulation Act of 1978 (the "ADA") and, (2) section 1506, which has been a part of the Act since its inception. These statutes provide, in pertinent part:

> **§ 1305. Federal preemption**
>
> (a) Preemption. (1) . . . [N]o State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier . . . .
>
> 49 U.S.C. Appx. § 1305(a)(1).
>
> **§ 1506. Remedies not exclusive**
>
> Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.
>
> 49 U.S.C. Appx. § 1506.

STATEMENT OF THE CASE

The court below has held that a passenger cannot sue an airline for breach of a ticket contract, and affirmed the final dismissal of two class action cases. In so doing, the lower court effectively interpreted this Court's opinion in *Morales v. Trans World Airlines, Inc.*, 504 U.S. ——, 119 L.Ed.2d 157 (1992), to mean that *all* ticket contract claims by passengers against airlines are preempted.

Review of the decision below is urgently needed. In direct conflict with the stated policy of the United States Department of Transportation (USDOT), and with a decision of the United States Court of Appeals for the Ninth Circuit, the court below has held that the keystone of free market commercial relations—the enforceability of contracts—was destroyed by the ADA. According to the lower court, airlines (and, presumably, passengers) are free to breach ticket contracts with impunity under the aegis of an overblown interpretation of preemption.

While straightforward breach of contract claims were not at issue in *Morales*, such claims are currently under review in another case now pending before this Court, *American Airlines, Inc. v. Wolens*, No. 93-1286 (October Term, 1993). This Court's decision in *Wolens* will almost certainly control the result in the instant case. For this reason, this Court should defer consideration of the instant case pending its ruling in *Wolens*. Otherwise, potentially millions of airline passengers will be subjected to the extinguishment of valid claims for breach of contract.

A. Background

This is a case for breach of airline ticket contracts. This consolidated [1] class action challenges two airlines' collection of a transportation tax in addition to refund

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[1] By order dated October 6, 1993 (App. 8a), the Appellate Court consolidated the petitioners' cases.

penalties on airline fares. The gravamen of petitioners' complaints in both cases is that the airline respondents contractually agreed to charge refund penalties of 25% of the fare, but collected penalties of 27% of the fare. Petitioners claim that, by including a federal tax in the calculation of the refund penalties, the airlines breached a contract to charge a penalty of "*25% of the fare*". JC490-91; BC 190, ¶¶ 7 & 8.[2]

B. The Impact of *Morales*

After this Court issued its decision in *Morales v. Trans World Airlines, Inc.*, 504 U.S. ——, 119 L.Ed. 2d 157 (1992), respondent American Airlines, Inc. (American) filed a motion for summary judgment, and respondent United Airlines, Inc. (United) filed a motion to dismiss, both of which contended that: (1) *Morales* compelled the conclusion that petitioners' claims were preempted, as a matter of law, by the ADA (49 U.S.C. Appx. § 1305(a)(1)) and, (2) various other grounds existed to dismiss the petitioners' claims. JC421-442; BC641. The trial courts, relying exclusively on the preemption analysis of *Morales*, held that petitioners' claims were preempted by the ADA's prohibition on state enforcement of any law "relating to rates . . . of any air carrier," and dismissed both cases. 49 U.S.C. Appx. § 1305(a)(1), App. 13a, 31a.

The Appellate Court, in affirming dismissal of these cases, relied principally upon *Morales, Statland v. American Airlines, Inc.*, 998 F.2d 539 (7th Cir. 1993), which summarily rejected similar claims in *obiter dicta*, and *Vail v. Pan Am Corp.*, 260 N.J. Super. 292, 616 A.2d 523 (1992), which held that the ADA preempted common law contract claims. App. 3a-5a. Although the de-

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[2] Citations to the records are abbreviated as follows: (1) For the record in *Johnson v. American Airlines, Inc.*, JC—— - refers to the page number of the Record on Appeal, (2) For the record in *Baskin v. United Airlines, Inc.*, BC—— - refers to the page number of the Record on Appeal.

cision of the Illinois Supreme Court in *Wolens v. American Airlines, Inc.*, 157 Ill. 2d 466 (1993), *cert. granted*, —— U.S. ——, 128 L.Ed.2d 69 (1994) (*Wolens*), had held that common law contract claims are not preempted, the Appellate Court summarily distinguished *Wolens*, and pointed out that this Court had granted certiorari in that case, the unarticulated assumption being that *Wolens* would be reversed by this Court. App. 6a.

REASONS FOR ALLOWANCE OF WRIT

In direct contravention of the stated policy of the USDOT, which is charged with the implementation of the ADA, the court below has held that passengers cannot enter into enforceable contracts for carriage on an airline. This holding is beyond the pale of any free market deregulatory scheme. For there will be no free market for airline tickets if airlines and passengers cannot rely on their contracts.

Application of the common law of contracts does not in any way interfere with an airline's rate-setting activity. The airlines here set the "rate" for their refund penalties. The petitioners accepted that rate, and a contract was formed. The airlines ultimately charged a rate different than the contract rate. In so doing, the airlines breached their contracts with the petitioners, and should be required to answer in damages for their breach.

Neither petitioners, nor the common law of contracts, has in any way interfered with the airlines' determination of their rates. *The airlines made their rate determination wholly without any interference from the law of any state.* The common law of contracts does not tell airlines what rate to charge. On the contrary, airlines are free to set rates in any manner they deem meet, without any regard for state law. But the law of contracts does state, permissibly, and consistent with the preemptive scope of the ADA, that *once an airline sets its rate, and a customer accepts it*, the parties can hold each other to the bargain struck.

The court below has effectively held that *all* state law claims by passengers against airlines are preempted by the ADA. The problem with this approach is that it proves too much—way too much. According to the airlines' tortured reading of the ADA, airlines are free to renege on contracts and, indeed, injure and kill passengers [3], without answering in damages to common law contract and tort claims. This approach defies common sense, and common law.

For a proper interpretation of the ADA, and *Morales*, inescapably leads to the conclusion that, once an airline has set its rate, and a customer accepts it, state common law can hold the airline to the rate *set by the airline*. This is the critical distinction missed by the airlines in claiming that airlines cannot be sued for breach of contract.

I. THE ADA DID NOT GIVE AIRLINES A LICENSE TO STEAL

The Appellate Court, the trial court and, indeed, some other courts, believe that *Morales* announced a change in the law of preemption of claims against airlines. But *Morales* did no such thing. That case did no more than confirm existing law, while clarifying the proper preemption analysis.

The lower court construed *Morales* to preempt *all* state laws, whether statutory or common law, affecting airlines in any way. That was not the holding of *Morales*. The holding of *Morales* was that an attempt by the National Association of Attorneys General to impose a detailed scheme of regulation on airline advertising, pricing and disclosure practices was preempted by the ADA. The

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[3] This is not a hypothetical concern. The United States Court of Appeals for the Fifth Circuit has held, albeit reluctantly, that injury claims against airlines are preempted by the ADA. *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350 (5th Cir. 1993), *reh'g en banc granted*, 12 F.3d 426 (1994).

scheme of regulation in that case was extremely comprehensive, filling no less than 15 pages in the Supreme Court Reporter (119 L.Ed.2d at 173-189.) In striking down this blatant effort at state regulation of airline rates and services, this Court first noted that the purpose of the ADA was to replace strict federal regulation of airline pricing and services with "maximum reliance on competitive market forces." 119 L.Ed. 2d at 164. The ADA was enacted to replace regulation with competition. Obviously, if the states stepped in to fill the regulatory breach left by the federal government, this legislative purpose would be defeated. *Id.* Thus, section 1305 (a)(1) prohibits states from enforcing any laws "relating to" rates, routes or services. In *Morales*, this Court astutely construed the words "relating to" liberally, relying on a dictionary definition which interprets the words to mean "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with. . ." 119 L. Ed. 2d at 167.

The lower court's interpretation of *Morales* stretches the holding of that case beyond the breaking point. According to the lower court's reading of *Morales*, for example, Arthur Johnson, one of the petitioners here, could pay cash for a ticket to New York and, when he shows up at the boarding gate, *American could refuse to allow him to board, and refuse him any refund.* Johnson would have no claim for breach of contract, at least according to the lower court's strained reading of *Morales*.

While *Morales* appropriately construed the ADA as a free market charter for the airline industry, that case did not, by any stretch of the imagination, announce a return to the days of Robber Baron piracy. On the contrary, this Court was careful to limit its holding to the comprehensive regulatory scheme adopted by the Attorneys General:

> To adapt to this case our language in *Shaw*, '[s]ome state actions may affect [airline fares] in too tenuous,

> remote or peripheral a manner' to have pre-emptive effect. In this case, as in *Shaw*, '[t]he present litigation plainly does not present a borderline question, *and we express no views about where it would be appropriate to draw the line.*' 119 L.Ed. 2d at 171-72 (citations omitted, emphasis supplied.)

The airlines' tortured reading of *Morales* is that *there is no line to be drawn*, that states can do *nothing* which has any tangential effect on airline rates, routes or service. While this Court construed the ADA to displace government regulation with the Laws of the Free Market, the airlines choose to read the ADA as a return to the Law of the Jungle. This position is plainly contrary to *Morales*, and to the ADA.

A state's application of traditional contract law to an airline ticket certainly falls on the right side of the line suggested by *Morales*. Freedom of contract is, indeed, one of the cornerstones of free market commercial relations. Without enforceable contracts, there is no market.

II. THE LOWER COURT'S INTERPRETATION OF THE ADA CONFLICTS WITH THE DEFINITIVE INTERPRETATION BY THE USDOT

As the agency charged with implementation of the Act, the USDOT's interpretation of the ADA is entitled to substantial deference. *Massachusetts v. Morash*, 490 U.S. 107, 116-17 (1989). The USDOT has unequivocally expressed its commitment to the enforceability of airline ticket contracts, in both its actions before this Court, and in its regulations.

While the USDOT favors reversal of *Wolens* because of the broad statutory claims asserted in that case, the USDOT was careful to state its position that common law breach of contract claims are not preempted. Indeed, the bulk of the USDOT's amicus brief in *Wolens* is directed at establishing that the "competitive, market-driven

choices embodied in private contracts" are not displaced by the ADA. *American Airlines, Inc. v. Wolens*, No. 93-1286 (October Term, 1993), Brief For The United States As Amicus Curiae In Support Of Reversal, pp. 15-30, 16. The USDOT has expressed its determination, in no uncertain terms, that the sort of contract claims at issue in this case are not preempted.

And the USDOT has also expressly acknowledged the role of enforceable contracts in the context of cancellation penalties in its implementing regulations for the Act. Part 253 of Title 14 of the Code of Federal Regulations deals with notice of the terms of the contract of carriage for air transportation. 14 C.F.R. §§ 253.1 *et seq.* The stated purpose of the regulations is to set uniform standards for incorporation by reference of contract terms in ticket contracts, and they are explicitly preemptive of state laws on the same subject. 14 C.F.R. § 253.1. With respect to refund penalties, carriers are forbidden to incorporate by reference such terms, and restrictions on refunds and monetary penalties must be conspicuously printed on the ticket. 14 C.F.R. § 253.7. The effect of failure to follow these regulations is plainly expressed:

> *In addition to other remedies at law*, an air carrier may not claim the benefit as against the passenger of, and the passenger shall not be bound by, any contract term incorporated by reference if notice of the term has not been provided to that passenger in accordance with this part. 14 C.F.R. § 253.4 (emphasis supplied).

In adopting this implementing regulation for the ADA, the USDOT clearly contemplated that a passenger could seek "remedies at law" for an airline's breach of the contract of carriage relating to refund penalties. Thus, the fact that the instant case is not preempted by the ADA is confirmed by the very federal agency charged with implementing that statute.

III. THE DECISION BELOW CONFLICTS WITH THE NINTH CIRCUIT'S DECISION IN *WEST*

In *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993), *cert. den'd.*, 127 L.Ed. 2d 374 (1994), a breach of contract and tort case brought by a passenger who was "bumped" by an airline, the United States Court of Appeals for the Ninth Circuit determined that the passenger's claims were not preempted by the ADA, holding that:

> We believe that the state contract and tort laws under which West seeks relief are within the range of statutes too tenuously connected to airline regulation to trigger preemption under the ADA, what the *Morales* court called "borderline questions." 995 F.2d at 151.

The *West* court went on to buttress its conclusion by reference to the implementing regulations of the Act, specifically 14 C.F.R. § 250.9(b), where the USDOT interprets the Act to leave a bumped passenger with the option of seeking "damages in a court of law." The Ninth Circuit deferred to the interpretation of the USDOT, and allowed West's state-law claims for compensatory damages to proceed.

The opinion below in the instant case simply cannot be squared with the Ninth Circuit's holding in *West*, with *Morales*, or with the ADA. By holding that airlines and passengers cannot enter into enforceable ticket contracts, the court below has placed itself in direct conflict with the Ninth Circuit, and with the statutory scheme embodied in the Act. The Ninth Circuit recognized that enforceable contracts are the foundation of free market commerce. The court below did not.

CONCLUSION

This Court should defer consideraiton of this case pending its decision in *Wolens*, at which point certiorari should be granted, and the decision below summarily reversed, or vacated and remanded for reconsideration in light of *Wolens*. In the alternative, this case should be set for plenary consideration. Absent review by this Court, potentially millions of airline passengers will be left without a remedy, and the freedom of contract which supports our free market system will be gravely jeopardized.

Respectfully submitted,

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January 4, 1995

APPENDICES

APPENDIX A

[Filed April 22, 1994]

ILLINOIS APPELLATE COURT
FIRST DISTRICT

Nos. 1-93-1156
1-93-1214

ARTHUR JOHNSON, individually and on behalf of all persons similary situated,
Plaintiff-Appellant,

v.

AMERICAN AIRLINES, INC.,
Defendant-Appellee.

Appeal from the Circuit Court of Cook County
Honorable John Hourihane, Judge Presiding

BERNARD BASKIN and MARILYN BASKIN, individually and on behalf of all persons similarly situated,
Plaintiffs-Appellants,

v.

UNITED AIRLINES, INC.,
Defendant-Appellee.

Appeal from the Circuit Court of Cook County
Honorable Lester D. Foreman, Judge Presiding

JUSTICE McNULTY delivered the opinion of the court:

Plaintiff Arthur Johnson appeals from the entry of summary judgment on his class action breach of contract suit against defendant American Airlines, Inc. (American). Plaintiffs Bernard Baskin and Marilyn Baskin appeal the dismissal of their class action breach of contract claim against defendant United Airlines Inc. (United). These appeals were consolidated.

Plaintiff Johnson called an American Airline ticket agent and purchased a reduced fare ticket for $158, comprised of $146.30 for airline transportation and $11.70 for Federal transportation tax. Johnson claims that the American ticket agent told him that the penalty for cancelling the ticket was 25% of the fare. When Johnson cancelled the ticket, he was assessed a penalty of 25% of the total ticket price.

Johnson brought this class action claiming that American breached its oral contract by charging him a penalty of 25% of the total ticket price, rather than only the cost for transportation. Johnson claims he was therefore overcharged $3.14. The trial court granted defendant's motion for summary judgment on the basis that Johnson's claim relates to rates and services and is thus preempted under section 1305(a)(1) of the Airline Deregulation Act (ADA). (49 U.S.C. App. § 1305(a)(1).) This appeal followed.

The Baskins purchased two reduced fare tickets on United Airlines for $516 each, which were comprised of $477.76 for air transportation and $38.24 for Federal transportation tax. The tickets were subject to a 25% penalty for cancellation. When the Baskins cancelled their tickets, they were assessed a penalty of 25% of the total ticket price for each ticket. The Baskins brought a class action suit claiming that United breached its contract

when it retained $9.56 for each ticket by improperly calculating the 25% penalty on the total fare, rather than solely on the air transportation portion of the fare. The trial court granted defendant's motion to dismiss, finding that plaintiffs' claim related to rates and was preempted under section 1305(a)(1) of the ADA. The Baskins appealed and their appeal was consolidated with Johnson's appeal since both cases involve the issue of whether plaintiffs' breach of contract actions were preempted by section 1305(a)(1) of the ADA.

Section 1305(a)(1) of the ADA provides in pertinent part that:

> "[N]o State or political subdivision thereof * * * shall enact or enforce Any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of an air carrier * * *." (49 U.S.C. § 1305(a)(1) (1988).)

In *Morales v. Trans World Airlines, Inc.* (1992), 504 U.S. ——, ——, 119 L. Ed 2d 157, 167, 112 S. Ct. 2031, 2037, quoting Blacks Law Dictionary 1158 (5th ed. 1979), the Supreme Court noted that the ordinary meaning of the words "relating to" is a broad one, that is, " 'to stand in some relation; to have bearing or concern; to pertain; refer; to bring onto association with or connection with.' " The Court compared the language in section 1305 to a similarly worded preemption provision in the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. § 1144(a)(1988)) which preempts State laws that "relate to any employee benefit plan." The Court adopted the same liberal construction applied in ERISA cases and held that State enforcement actions having a "connection with or reference to airline 'rates, routes, or services' are preempted under section 1305(a)(1)." *Morales*, 504 U.S. at ——, 119 L.Ed at 167-68, 112 S. Ct. at 2037.

Applying this test, the *Morales* Court determined that State regulation of allegedly deceptive airline rate advertisements related to rates and was therefore preempted by section 1305(a)(1). Despite this ruling, the Court explained that not all State claims are preempted by section 1305(a)(1) and that State laws against gambling and prostitution as applied to airlines are not preempted. The Court also declined to address whether State regulation of the non-price aspects of fare advertising, such as State laws preventing obscene depictions, would similarly relate to rates. The Court noted that some State actions may affect airline fares in too tenuous, remote, or peripheral a manner to have preemptive effect. The *Morales* Court found that the fare guidelines at issue there did not present a borderline question, and therefore expressed no opinion as to "where it would be appropriate to draw the line" regarding the types of actions that would be preempted by section 1305(a)(1). (*Morales*, 504 U.S. at ——, 119 L.Ed. 2d at 172, 112 S.Ct. at 2040.) Lastly, the court stated that its decision did not "give the airlines *carte blanche* to lie and deceive consumers; the [Department of Transportation] retains the power to prohibit advertisements which in its opinion do not further competitive pricing." *Morales*, 504 U.S. at ——, 119 L. Ed. 2d at 172, 112 S. Ct. at 2040; see 49 U.S.C. App. § 1381 (1988).

The facts in the instant case present an even more compelling basis for preemption than did the facts addressed by the Court in *Morales*. In *Morales* the preempted State law claims concerned, among other things, advertising of limitations on refunds. Here, the State law claims attack not merely the advertising on limitations on refunds, but the limitations themselves.

In *Statland v. American Airlines* (7th Cir. 1993), 998 F.2d 539, the Seventh Circuit decided a case with facts virtually identical to those presented here. The plaintiff

in *Statland* bought an airline ticket carrying a 10% cancellation penalty. When plaintiffs cancelled the ticket, American Airlines kept 10% of the Federal tax plaintiff had paid, in addition to 10% of the ticket price. Plaintiff filed a class action suit which contained State law claims alleging breach of fiduciary duty, violation of the Consumer Fraud Act, conversion and breach of contract, based on the airline's retention of 10% of the Federal tax. The court found it "obvious that cancelled ticket refunds relate to rates" and that under *Morales* and section 1305 (a), plaintiff's claims were preempted since States cannot regulate American's refund practices either by common law or by statute.

Similarly, in *Vail v. Pan Am Corp.* (1992), 260 N. J. Super. 292, 616 A.2d 523, plaintiffs brought an action alleging fraud or consumer fraud, and breach of contract, claiming that the airlines falsely advertised that they were initiating an enhanced security program, then charged $5 per ticket to defray the costs of the program when in fact the airline did not provide such a program. The court noted that if plaintiff's State claims were allowed, this would result in multiple and potentially conflicting standards controlling airline advertising, services and rates. The court therefore determined that under the broad interpretation given to section 1305 by *Morales,* plaintiff's claims challenged rates and services and were preempted.

Based on the *Morales* Court's broad interpretation of the term "rates," and the manner in which *Statland* and *Vail* have interpreted *Morales,* we are thoroughly convinced that plaintiffs' claims relate to rates. Although plaintiffs claim that if we find preemption here, then all State claims will be preempted, a similar argument was made and rejected in *Morales.* The plaintiffs' claims do not require us to address a borderline preemption question. Rather, the State law claims here clearly relate to the rates charged by airlines for reduced fare tickets.

Furthermore, to allow plaintiffs to bring these State law claims would create exactly the type of rate inconsistency among States which Congress intended to prohibit by enacting the Federal preemption language of section 1305 (a)(1).

Recently, in *Wolens v. American Airlines, Inc.*, the Illinois Supreme Court considered whether plaintiffs' suit alleging breach of contract, and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, based on American's retroactive modification of its frequent flyer program, was preempted by section 1305(a)(1). (Illinois Supreme Court, May 1993, No. 71418.) The court in *Wolens* found that plaintiffs' suit did not relate to rates, routes, or services of an airline since a frequent flyer program is not an essential element to the operation of the airline.

On April 4, 1994, the United Supreme Court granted *certiorari* of *Wolens*. (*Wolens v. American Airlines Inc.*, (United States Supreme Court, April 4, 1994, No. 93-1286). Regardless of whether the Supreme Court finds that *Wolens* has been correctly decided, that decision would have no effect on the instant case, since the issue here is more closely connected to rates.

Lastly, we note that our decision does not leave plaintiffs without a remedy. If plaintiffs wish to pursue their claims, they may file a claim with the Department of Transportation, which has been specifically designated by Congress to administer and enforce consumer protection law. 49 U.S.C. App. § 1381 (1988); see *Statland v. American Airlines, Inc.*, 998 F.2d at 542.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

MURRAY, P.J. and COUSINS, J., concur.

APPENDIX B

[Entered May 26, 1994]

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

No. 1-93-1156
1-93-1214

ARTHUR JOHNSON, individually and on behalf of all other persons similarly situated,
Plaintiff-Appellant,

v.

AMERICAN AIRLINES, INC.,
Defendant-Appellee.

BERNARD BASKIN and MARILYN BASKIN,
Plaintiffs-Appellants,

v.

UNITED AIRLINES, INC.,
Defendant-Appellee.

ORDER

Upon consideration of petition for rehearing filed by plaintiffs-appellants,

IT IS HEREBY ORDERED that said petition for rehearing is DENIED.

/s/ [Illegible]
Justice

/s/ [Illegible]
Justice

/s/ [Illegible]
Justice

APPENDIX C

[Entered October 6, 1993]

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT/SECOND DIVISION

93-1214

BERNARD BASKIN and MARILYN BASKIN,
Plaintiff/Appellant

vs.

UNITED AIRLINES, INC.,
Defendant/Appellee

Appeal from the Circuit Court of Cook County, Illinois
County Department—Chancery Division

86 CH 9085

Honorable Lester D. Foreman, Judge Presiding

ORDER

This cause coming to be heard on the plaintiff's Motion To Consolidate And For Combined Briefing Schedule, the Court being advised in the premises;

IT IS ORDERED:

The plaintiff's Motion To Consolidate And For Combined Briefing Schedule is:

X Granted.

— Denied.

So Ordered:

/s/ [Illegible]

/s/ [Illegible]

/s/ [Illegible]

/s/ [Illegible]

APPENDIX D

77475

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

October 6, 1994

Mr. Jerome E. Boyle
Attorney at Law
33 North LaSalle St., Ste 3000
Chicago, IL 60602

No. 77475—Arthur Johnson, Indiv., etc., respondent, v. American Airlines, Inc., et al., respondents (Bernard Baskin et al., etc., petitioners). Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1994.

APPENDIX E

IN THE SUPREME COURT OF ILLINOIS

No. 77475

ARTHUR JOHNSON, INDV., ETC.,
Respondent

v.

AMERICAN AIRLINES, INC., *et al.*,
Respondents

(BERNARD BASKIN *et al.*, ETC., *petitioners*)

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85 CH 12888
86 CH 9085

1-93-1156
1-93-1214

ORDER

This matter has come for consideration upon the motion of petitioners to stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such

filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

[Filed Oct. 18, 1994]

/s/ [Illegible]
Justice
Supreme Court of Illinois

APPENDIX F

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

No. 86 CH 9085
Hon. Lester D. Foreman

BERNARD BASKIN and MARILYN BASKIN, individually and on behalf of all persons similarly situated,
Plaintiffs,

v.

UNITED AIRLINES, INC.,
Defendant.

ORDER

THIS MATTER COMING BEFORE THE COURT on the Motion of United Airlines to Dismiss the Third Amended Complaint, due and proper notice having been given, the parties having filed written memoranda of law, the Court hearing argument of counsel and being duly advised of the premises:

IT IS HEREBY ORDERED that consistent with this Court's findings and discussions as set forth in the record hereof, that this Court hereby grants United Airlines' Motion to Dismiss the Third Amended Complaint, with prejudice and that the Third Amended Complaint and the causes of action set forth therein shall be and are hereby dismissed with prejudice.

IT IS HEREBY FURTHER ORDERED that this is a final Order resolving all matters before the Court and

this Court finds no just reason to delay enforcement or appeal of this Order.

Entered this 19th day of March, 1993.

ENTER

/s/ Lester D. Foreman
LESTER D. FOREMAN
Judge

[Entered Mar. 19, 1993]

APPENDIX G

[Filed April 13, 1993]

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

No. 86 L 9085

BASKIN,

Plaintiff,

VS.

UNITED,

Defendant.

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause before the Honorable Lester Foreman. Judge of said court, on the 19th day of March, 1993, at the hour of 2:00 o'clock p.m.

* * * *

[2] MR. TIBBLE: Douglas Tibble here on behalf of United Airlines, defendant and movant.

MR. COHEN: Good afternoon, Your Honor, Edward Cohen on behalf of the plaintiff.

MR. TIBBLE: Your Honor, this comes before the Court on our motion to dismiss the third amended complaint filed in this cause. The matter was fully briefed and is here, I believe, for argument and, hopefully, ruling this afternoon.

MR. COHEN: Your Honor, this has been before you once before. You may recall there were extensive arguments. This matter was before you previously on defendant's motion to dismiss. At that time you did grant leave

to file an amended complaint, and we did, in fact, file an amended complaint, which we believe comports to Your Honor's previous ruling.

As counsel for the defendant has stated that there have been extensive briefs and arguments on this case, at this time plaintiff would suggest to the Court that we would rest on our briefs; however, are, in fact, willing to give further argument and answer any questions that Your Honor may have.

[3] THE COURT: Counsel.

MR. TIBBLE: Your Honor, we don't waive the opportunity to summarize the arguments for the Court. We'd like an opportunity to do so. If the Court is prepared to rule without that—

THE COURT: I am prepared to hear you, gentlemen.

MR. TIBBLE: I will spend a few minutes, if I may, Your Honor. As indicated, Your Honor, this comes before the Court on our motion to dismiss the third amended complaint filed by the plaintiff in this cause. It's their fourth opportunity since 1986 to file a cause of action for which relief can be granted.

The issue before the Court today, Your Honor, arises from certain statutory language contained in the Airline Deregulation Act of 1978. Since we have argued this before, I think it is important just to go back to the language of that Act.

That Acts provides that no state shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes or services [4] of any air carrier. Subsequent to that—

THE COURT: I think to get right to the, as they say, right to the quick, go right to the jugular, the problem here is that the plaintiff takes the position that you don't understand what they're attempting to accomplish because they talk about this penalty, as your client asserts it, is applied against the tax, as well as the actual

transportation charge. And on that basis, they say that it really isn't something that effects a rate.

Now, I am not inventing that, and I don't say that in a depreciating fashion, but if you remember what he says in one of his submissions, he said that the defendant misapprehends their cause of action. Do you remember that?

MR. TIBBLE: I remember that, Your Honor.

THE COURT: So in other words, I am not inventing this, I am just in a way I am being an egotist because I am trying to show that you I have read the pleadings.

MR. TIBBLE: Your Honor, I believe the Court read the pleadings, and I think if you read [5] the pleadings, what they say in their brief is not what their pleading says.

Their pleading says, and I'll cut to that, Judge. Count 1, breach of contract, and then subtitled breach of promise. Count 2, breach of contract, unenforceable penalty on tax. Count 3, breach of contract, unenforceable penalty.

Your Honor, what this lawsuit is about is about the rates provided by United for classification of tickets. The Vail Case, which we cited, Your Honor, goes right to that issue.

THE COURT: That's a New Jersey case.

MR. TIBBLE: That's the New Jersey Appellate Court case that came out after Morales, of course. And in the Vail Case, the court there said—Let me just quote it quickly.

THE COURT: That's the case that had $5 service charge.

MR. TIBBLE: $5 service charge on the ticket, you're right, Your Honor. Let me just find the quote from Vail because I think that's instructive. In Vail the court says, "the conclusion is inescapable that Congress intended to reject the dual enforcement of state law claims [6] relating to rates and services and to vest the Federal Department of Transportation with the exclusive author-

ity to regulate and adjudicate allegations of deceptive and fraudulent advertising and practices in the airline industry."

What they're alleging, despite what they think—they're telling you they're alleging is somehow this rate structure was wrong, fraudulent, deceptive, applied wrong. In Vail, that's exactly what the Court—

THE COURT: He says they're not applying it on the rate. You're applying it on the tax.

MR. TIBBLE: That's not what they allege though, Your Honor. They allege there's a contract to pay a certain amount for air fare, and that the contract was breached, and that more was withheld than the penalty or it was breached because we withheld the penalty.

Count 2, Your Honor, says the whole penalty on unenforceable contract provision. And as Judge Hourinane ruled on a similar case to this—

THE COURT: By the way, I find that very entertaining. It's really very entertaining to [7] me. In fact, I mentioned it to some lawyers in an argument this morning. When you go to Hourihane, you tell him what Foreman said. When you come to Foreman, you tell him what Hourihane said. I got more fun out of reading the transcript. You're making Hourihane think he better do what Foreman does. Your making Foreman think he better do what Hourihane does. What we ought to do is—I would want to even recommend that Hourihane and I sit en banc on this case so you cannot whipsaw us one again the other.

MR. TIBBLE: What may be interesting about that, Your Honor, is the only connection between those cases is the same plaintiff's counsel. I am not whipsawing anyone.

THE COURT: There's no question in the transcript that you submitted to me there, listen. Judge, you know what Foreman said in these cases.

MR. TIBBLE: I take it that Judge Hourihane made a decision on what he thought the law was, and I take it that this Court will make a similar decision on what this Court thinks the appropriate law is.

THE COURT: Right.

[8] MR. TIBBLE: The crux of this is, if you read their third amended complaint, it's a breach of contract claim. That's exactly what it is. That's exactly what Vail and what Morales says the state courts are not to decide on a piecemeal basis state by state.

The Airline Deregulation Act provides a mechanism, as shown in Vail, to resolve this with the Department of Transportation. That's where it should be brought. That's the broad preemption language, and the ADA says that's what should happen with it.

Your Honor, every case cited since then is consistent with it. The Supreme Court struck down the West Decision that we indicated. The Supreme Court struck down the Illinois Supreme Court decision in Wolens that varied with the Morales position.

Your Honor, we have an explicit preemption provision that the Supreme Court said is as broad as it can be, as broad as the ERISA preemption. We have a statute that provides a remedy, and that's an exclusive remedy.

There's no cause of action they can [9] allege here, and they certainly don't allege any cause of action that's different than the breach of contract claim in Vail and the breach of contract claim purportedly alleged in Wolens and in West and in Morales. They're at the end of the rope at this point. There's nothing they have pled.

When we were here last time, they promised they were going to plead a breach of trust case, and I can refer you to that language. It was a breach of trust regarding taxes that belonged to the United States Government that were not paid to the Government. That's not in this pleading. It's the same pleading we have had three times. It's got more paragraphs. It's the same claim.

We think that the case—that the motion should be granted and that the third amended complaint should be dismissed with prejudice.

THE COURT: Counsel.

MR. COHEN: I do take exception to defendants analysis. A clear reading of the complaint, it is sufficiently different than the—

THE COURT: Counsel, I think that the problem you have here is, as counsel says, the preemption here is exceedingly broad.

[10] MR. COHEN: If I may, Your Honor.

THE COURT: Go ahead. How are you going to get around that.

MR. COHEN: I don't think that Morales is to be interpreted to preempt every single situation regarding the airline industry. The way defendant reads that, under no circumstances could a passenger or an individual ever sue the airlines because every single situation will involve rates, routes or services.

I cannot believe that if you pay for a ticket to be provided air transportation, and you get to the gate of United and you say, here is my ticket; I am going to fly, and they say no, we're not going to honor that ticket, good-bye. I cannot believe that the Supreme Court in Morales says, well, you have civil cause of action. You have no private cause of action. They're going to say, well, that has to do with services. They are going to provide you service. I don't think it's to be interpreted that broadly, and I think the Supreme Court even said that they do not intend to preempt the whole field under every situation. And if I may—

[11] THE COURT: Counsel, let's say I agree with that. But let's say that I agree with the fact that there may be some circumstances under which you could have a situation where, perhaps, the preemption won't apply, but thank goodness I am not required to decide every conceivable, potential consequence. I have to deal with this specific situation with regard to this 25 percent on this

particular type of a ticket arrangement. And the question is, am I dealing with a rate situation.

MR. COHEN: Absolutely not, Judge. They could charge whatever rate they want. We are not contesting the rate. Let them charge what they want. Let them agree to whatever they want. Let them contract to whatever they want. Obviously we cannot contest that, and that probably would be preempted.

If you want to get down to it, we're contesting the calculation, their addition, their subtraction, their multiplication, how they improperly calculated the penalty. We don't care if they charge a penalty. They're entitled to charge a penalty, and that was the contract. But the contract was clear that the penalty was on the [12] fare. Now they are collecting a tax in trust for the U.S. Government. It's not theirs; it's the governments. And there is no new agreement to charge a tax—a penalty upon that tax. They went ahead.

We're not contesting the fares or anything like that. They just went ahead and calculated a penalty upon a tax, having absolutely nothing to do with their fares. They got the penalty on the fare. We don't contest that aspect of it. We couldn't. Morales is clear on that. It is limited to the tax that they collect in trust, which is properly pled in our complaint. And they just had no basis for that, Judge. And it has obsolutely nothing to do with rates, fares or services.

THE COURT: Counsel, when you charge this—when you make the calculation against the tax, is it your position that the tax is a part of the fare?

MR. TIBBLE: Your Honor, that goes to the evidence, but that would be—if we got to the evidence, that's exactly what it is. The tariff or the regulation, the contract or the agreement, or [13] whatever they want to call it, but certainly the regulation we publish is that word fare does not mean transportation cost. It means the ticket price. That's what it was—

THE COURT: Even though it includes the tax?

MR. TIBBLE: That's right, Your Honor. If you look in the advertisement in the paper, when it says fare to Florida $99, when you go to that window, you pay $99. You don't pay 99 plus tax.

MR. COHEN: If I may respond.

MR. TIBBLE: This isn't the case that's pled here. That's not what—We're talking about evidence. But when you go to that word fare, that's what they use it for in that instance. If we get to the evidence situation, that's the kind of evidence that would be there. That's the very thing that Morales tells us the Congress does not want to have happen on a state-by-state basis. They don't want the regulation where one state says, when you say fare, you must mean that fare. Another state says, when you say fare, you must include the tax because it would be misleading to tell people, fare to Florida $99, and when they [14] come to buy the ticket, you say it's $99 plus tax.

That's exactly what the purpose of deregulation was. That's exactly the purpose of 1305 A-1 was to prevent that. That's the theme that runs through Morales. It runs through Vail. That's the reason why West was reversed, and that's the reason why Wolens was reversed because it ran contrary to that theme.

If I might just finish, Your Honor, the cases we do have to look at do support the broad preemption. Morales, of course, had to do with advertising and the regulation of advertising, among other things, including what a State could say and what would be appropriate in a particular state to say about this type of discount fare, how it needed to be advertised, or the appropriate way.

The West vs. Northwest Airlines, Your Honor, was over booking. That was reversed by the Supreme Court. Wolens had to do with the frequent flyer. That was reversed under Morales. Vail vs. Pan Am, of course, is the $5 security, and the Johnson Case before Judge Hourihane was the same as here.

[15] But, Your Honor, the other point I want to make is, you and I read the pleadings. I don't think counsel did. If I can just quote their pleading to you. This is Count 2, and it's Paragraph 12. "In calculating the penalty, they improperly and in breach of contractual agreement between the parties assessed a penalty on the federal tax." That's a breach of contract.

MR. COHEN: Which was collected in trust by the defendant.

MR. TIBBLE: That's a breach of contract. That goes right to our route. That goes right to our fare, our rate. If that's our rate, he's saying we cannot do it because it's a trust. That goes right to the issue of what an appropiate rate is. Can a penalty be based on what numbers and what amount. That's the whole concept of the rate.

Count 3, Paragraph 9 on Page 11, "the 25 percent penalty having no relationship to the defendant's damages in being improperly imposed as penalty for non-performance of the plaintiffs is unenforceable at law." That goes right to the rate. It's not their particular calculation claim [16] they're crying about. That says you may not have a penalty there.

And it goes on because the law abhors a penalty. He may be telling you one thing, but that's not what they're pleading. And that's not what they have pleaded since 1986.

MR. COHEN: I would like to respond to that.

MR. TIBBLE: Moreover, even if the issue was calculation, what number was appropriate to put in the multiplicand when I apply my percentage to that, that's the very heart of the determination of a rate. That's exactly what Morales said we're not going to allow the states to re-regulate in the Airline Deregulation Act.

What number goes in that multiplicand when you determine the penalty or service charge at a refund, that's the heart of rates, Your Honor. That's what this case is about, and that's what every case that anyone has cited in any of these briefs tell you it's about.

They haven't cited one case to the contrary. The one they have is reversed by the Supreme Court, specifically reversed.

[17] THE COURT: Counsel.

MR. COHEN: With respect to that penalty provision where the law abhors penalty, counsel has taken that out of context. That's a separate and distinct cause of action, and that's in a separate count. It has nothing to do with —That's a separate claim as opposed to the way they applied the penalty on the tax. That's number one.

Number 2, Judge, I know this isn't an evidentiary hearing, but for your information, Judge, at the time that the cause of action arose, and this was in our previous pleadings and it was in our motion prior to today, at that time, the defendant filed a tariff. And that tariff, Judge, specifically said with respect to this ticket, Mr. Baskin's ticket, that the fare is the amount of transportation and does not include the tax.

Now, subsequently they amended their tariff. But at the time this arose, the tax was separate and distinct.

Vail is distinguishable, Judge. We are not challenging the fare. We're not challenging any advertising. We're not challenging anything other than the fact that they imposed a [18] penalty on the tax. In Vail—

THE COURT: Counsel, let me ask you. If the Court wanted to say that the preemption only applies specifically to what you could say is allocated only to the fare that is charged for the transportation service, wouldn't the Vail case have been an easy case in which the Court could have said that because they can say, wait a minute, this $5 service charge, what's that got to do with flying on the airline. What's that go to do with the transportation between one point and a destination. This is a charge that's being charged for purpose of affording security. What's it got to do with transportation? This is for the protection of the passengers when they're on the ground.

MR. COHEN: This was a charge that was asserted by the airlines. It was part of the agreement that they would

charge this, and, therefore, it's part of the airlines fare and nobody has a problem with it, and Vail clearly says that Wolens applies.

THE COURT: It has nothing to do with the movement between one point and the destination. [19] What is the $5 charge that's being made for affording an enhancement of security on the ground got to do with air transportation?

MR. COHEN: If it is part of their ticket, and if it is part of the agreement with the public and the passenger that it is included in the fare, then it's part of the fare. It's totally distinguishable from our situation where we have an agreement to pay whatever the airline wants to charge. We have an agreement to pay a penalty on the fare. That is part of their fare, and we have no problem with that.

There's no authority whatsoever for them to go ahead and start charging penalties upon a tax that is to be remitted to the government that they are collecting in trust. That is the distinction. It has—That penalty on the tax has absolutely nothing to do with their fare. It's never stated as fare. It's never agreed to as a fare. It's never represented to the public as a fare. And that's the distinction, Judge.

THE COURT: Well, it is represented to the public as a fare.

MR. COHEN: No.

[20] THE COURT: Because you get that lump sum.

MR. COHEN: No, you don't, Judge. If you look at the ticket, it specifically says fare. It specifically says tax, and then it says, total. And their tariff that they filed says that the tax isn't part of the fare. The tax is separate and distinct, collected in trust for the government. There's a big distinction. And every single ticket issued by the defendant segregated the tax from the fare.

THE COURT: What about that?

MR. TIBBLE: Your Honor—

THE COURT: Is there a breakdown on the ticket with regards to what—

MR. TIBBLE: No question there's a breakdown on the ticket. Again, we're getting to the evidence, which isn't before the Court. No question there's a breakdown so United knows what portion of the fare or the amount it determines goes to the government. No question about that.

My statement before was, Your Honor, and there's an issue here as to whether we have a contract because there is a motion for summary [21] judgment that the Court didn't have to rule on before. The question is, Your Honor, and what I said before is the representations made to the public about what it costs, what the fare is to go someplace is that total amount upon which we applied that percentage. It's the fare plus tax. Well, we say the fare to Florida on the ticket, there's no question. We have never doubted that, though it hasn't come before the court that it's broken down, but in the publications to the public, upon which I guess, if there's a contract here, someone will testify I relied on, he will say, when I looked in the paper it was $100 to Florida, it was actually $92 plus $8 tax, but we advertise $100 to Florida. When he saw 25 percent of fare, that's what the penalty was.

But I think, Your Honor, Vail is very instructive for this Court. Because as the court pointed out in Vail, the court had the opportunity to say, this is a promise made that I will give you enhanced security. It's not part of the fare. It's for something else. I am going to put a surcharge on of $5 to provide you this service. And in Vail the Court even said, they [22] didn't give it to them. They lied to the public. They misled them. They breached the contract. You want to call it whatever you want. They didn't get the security they charged the public for, but the court said there that Morales is so broad that that's even contained in the preemption of Morales.

Here, Your Honor, the thing we're talking about here, assume it to be true that they're pleading that was represented the multiplicand would be the net fare, we apply the 25 percent to the amount, less tax. That's what we told them. Let's assume that to be true. That's even more closely related to what the fare was, what the cost to fly and what you get back if you canceled your tickets is then a $5 surcharge for ground security. That's the heart of the fare.

That's why I think, Your Honor, Morales is so instructive that says—Vail is so instructive that—Morales is so encompassing that even a surcharge that has nothing to do with transportation is preempt.

MR. COHEN: One last thing, Judge.

THE COURT: Yes, sir.

[23] MR. COHEN: Final closing argument. At Page 171 of Morales, the Supreme Court takes pains to state that there are certain aspects that they will not regulate in the airline industry where the issue is either too remote or tenuous to fares. And they say in this case, as in Shaw, which is another airline case, the present litigation plainly does not present a border line question, and we express no views about where it would be appropriate to draw the line. Counsel is suggesting that every situation is preempted.

THE COURT: I don't think he said every situation. He's talking about this situation. I am willing to rule with regard to this situation.

MR. COHEN: Okay.

THE COURT: What he's doing is he's calling upon —What he's doing is he's calling upon other precedents as an example of how far the courts have gone.

MR. COHEN: I understand. But you'll notice, Judge, that the Supreme Court didn't overrule or reverse Wolens. They vacated it and sent it back to the Illinois Supreme Court.

THE COURT: They certainly didn't lend [24] their approval to it either, did they.

MR. COHEN: They didn't say that this is clearly a situation where preemption applies, but they didn't do that.

THE COURT: If they were going to feel that the preemption didn't apply, they could have really come forward and said so, and they didn't do that.

Counsel, I have relived my life a second time in this case. I have gone back through it again. And I just have not seen anything take place that has caused me to change my position from the last time I visited this case.

And I say this for the record, I have a strange quirk about reviewing matters, and sometimes it's a criticism that lawyers can make when they think a judge is faced with, let's say, a motion for reconsideration. I perhaps give a motion for reconsideration more concern than I do the initial consideration because I want to rethink the matter.

And, frankly, I think I have tried in this case to find some justification in my mind for sustaining your cause of action because, first [25] of all, I am sympathetic with the fact that you have been fighting this case since 1986, and maybe I am really doing you a favor because when I rule against you today, I am really giving you an opportunity to, so to speak, cut the cord and go on to three wiser men than myself because, as I view it, and this is perhaps where if I am wrong, this is where I'm going wrong, I view this preemption under this statute, under this airline deregulation situation as being exceptionally broad. And I can't see where in a situation such as the one that I am confronted with which deals with the ticket price and the price for transportation, and irrespective of the fact that there's this breakdown with regard to tax and how much is for the transportation, in my heart of hearts, I believe that when they enacted this preemption, they were talking about situations that involved this type of activity.

They can't foresee every conceivable circumstances that's going to arise, but I don't think, and I guess this is really

the gravamen of my decision, I don't think that I can carve out this situation and say this is a situation which is [26] an exception to the preemption because I just don't think this is what they meant.

Now, maybe as I said before, maybe three wise men will say, well, maybe your argument is with regard to this issue with regard to the tax. And maybe you can sell that to some court because it has some cogency to it, but I think that when you're talking about airline deregulation and you're talking about the government's involvement in the airline industry, I think you're talking about them painting this activity with a broad brush, and I think they're talking about guys like me staying away from involving themselves in litigation that involves this type of activity.

Maybe I am looking at it too broadly. Generally I think I am a narrow minded person, but I just think with regard to this airline deregulation, they were talking about matters involving the airlines, matters involving ticket price, matters involving concerns of this nature.

And it just seems that this Vail Case is a strong influence upon me because it seems to me that if it was the kind of a situation where [27] they were saying, we're talking about air transportation, we're talking about ticket prices, we're talking about what the ticket says, we're talking about movement through the air from one place to another, and here is a situation where the Vail Case would be a better case in your case.

In the Vail Case, they could have said, wait a minute, what are you talking about; this has got nothing to do with air transportation; this has got nothing to do with what we're charging people from to move from one place to another; this is for their security, and on top of it, they didn't even get. What do they do? They say preemption applies. I just think it's—I think I am doing you a favor in this respect. There's no one, no one in this building more conscious of the principle that I am not to dismiss a cause of action with prejudice unless I

am convinced that under no set of facts could the plaintiff be entitled to its remedy. And I think we have reached that point in this case because I don't know what more you can tell me. I don't know what more you can plead. I don't know what more you can allege that would suggest that the preemption not [28] apply because I just am convinced that it's broad enough to take in.

You cannot change the facts. We know what Mr. and Mrs. Baskin did. It's there. The facts can't change. And I don't think that my appraisal or attitude or interpretation of this Section 1305 A-1 is going to change. So I think that there's a point in which I have to bite the bullet and say I am going to dismiss this case with prejudice. And let's go and see what an Appellate Court is going to say.

It's silly for you to be repleading and repleading. If this is a cause of action and it's a good cause of action, I am sorry to have to put the plaintiffs through the expense, but I wouldn't be honest with myself if I didn't do that. I can't just say a cause of action is there because somebody filed one. I don't believe in it. Motion to dismiss with prejudice is sustained.

MR. TIBBLE: Thank you.

MR. COHEN: Thank you, Judge.

APPENDIX H

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

No. 85 CH 12888

Judge Hourihane

ARTHUR JOHNSON,

pltff.

v.

AMERICAN AIRLINES, INC.,

deft.

ORDER

This cause coming on defendant American Airlines, Inc.'s motion for summary judgment, the parties receiving notice and the Court having been advised in the premises:

IT IS ORDERED that defendant's motion for summary judgment is granted for the reasons stated by the Court during hearing on this date; this order is final and appealable, there is no just cause to delay enforcement or appeal.

[Entered Feb. 23, 1993]

ENTER:

/s/ John Hourihane
Judge

APPENDIX I

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

No. 85 CH 12888

JOHNSON,

Plaintiff,

vs.

AMERICAN AIRLINES,

Defendant.

REPORT OF PROCEEDINGS had in the above entitled cause, before the Honorable JOHN N. HOURIHANE, one of the judges of said Division, on the 23rd day of February, 1993.

* * * *

[2] THE CLERK: Johnson -v- American Airlines.

THE COURT: This matter is before the Court for a ruling on the motion for summary judgment that has been filed in this matter by the defendant.

The Court reviewed all of the pleadings that have been filed in this matter with regard to the motion for summary judgment.

The Court has reviewed the transcripts and depositions that have been filed, and the case law that has been cited. This is the third amended class action complaint. It's filed in two counts.

Count 1 is for breached of an oral contract. Plaintiff contends that the penalty for cancellation of an airline

ticket was 25 percent of the fair, less the taxes. Whereas, the defendant in this matter calculated the penalty on the total price of the tickets including the taxes.

Plaintiff seeks an accounting of all monies retained by defendant in excess of the penalty or service charge defendant was entitled to assess; judgment for the excess sums of plaintiff's distribution fees and costs.

Count 2 alleges that the inclusion of taxes in the calculation of the cancellation penalty was [3] intended to penalize and deter plaintiff from cancelling, and as such constitutes a forfeiture or penalty which is unenforceable at law.

The plaintiff seeks an accounting of "of all sums. Strike that.

Plaintiff seeks an acocunting of all, "Sums of money which were federal transportation taxes retained as part of a percentage penalty or service charge." The defendant moves for summary judgment on three separate grounds.

One, preemption by the Airlines Deregulation Act of 1978, the ADA in 49 USC 1305A1, as interpreted by the United States Supreme Court in Morales -v- Trans World Airlines, Number 90-1604, decided on June 1, 1992.

Two, defendant has not retained any portion of the tax. There was no cognizable cause of action for a tax refund. This is strictly within the Federal Purview. Section 7422 of the IRS Code provides exclusive remedy for obtaining a tax refund.

Three, a service charge is not an unenforceable penalty as a matter of law. Purveyors of tickets are not required by law to refund the purchase price of an advanced purchase ticket when the purchaser [4] later opts not to attend the event, Richman -v- Chicago Bears Football Club, 127, Ill. App. 3rd, 75.

Under any reading of the Morales Decision, it is apparent that common law actions for breach of contract are preempted by the ADA or Airline Deregulation Act.

Morales expressly extended presumption beyond State

Government enforcement actions to all state law claims relating to inter alia limitations on airline rates.

The Supreme Court analogized the broad preemptive sweep of the ADA to that accorded ERISA. Particularly in Pilot Life Insurance Company -v- Dedeaux, 481 US 41, in which the Supreme Court held that a common law contract action seeking damages for the failure of employee benefit plan to pay benefits "related to" employee benefit plans and was preempted by ERISA.

Plaintiff cites the Illinois Supreme Court decision in Wolens -v- American Airlines, 147 Ill 2nd 367, is misplaced.

The rationale under which Wolens was decided, that 1305A-1 preemption extends only to State laws specifically directed to airlines was rejected by [5] the U.S. Supreme Court, who in an order issued October 5, 1992, vacated the Wolens Decision and remanded it for reconsideration in light of the Morales decision.

Count 2 was similarly based on breach of contract theory, specifically that involving liquidated damage clauses, as such, was also pr_empted by Morales.

Further review of the rationale and discussion of the Appellate Court in Vail -v- Pan Am, 616 Atlantic, 2nd 523, is very compelling and supportive of my decision in this case.

The motion for summary judgment is granted.

THE COURT: Thank you, very much. Just prepare an order incorporate my ruling with the findings.

Would you please identify yourselves for the record?

MR. BOHRER: My name is David Bohrer, B-o-h-r-e-r. I'm one of the counsels for American Airlines.

MR. PELTON: Russell Pelton also representing American Airlines.

MR. COHEN: Edward Cohen on behalf of the plaintiff.

MR. BOYLE: Jerry Boyle on behalf of the [6] plaintiff.

THE COURT: Thank you, very much.

MR. PELTON: Can we bring in a written order tomorrow setting out the findings of fact and conclusions, showing counsel first?

MR. BOYLE: Your Honor, that can oftentimes become a difficult matter.

THE COURT: It is probably easier to find that I'm granting summary judgment for reasons that I have stated of record.

MR. BOYLE: Thank you.

MR. PELTON: Fine.

THE COURT: Just incorporated it that way.

(Which were all the proceedings had.)